HONG LEONG BANK BHD v. STARFISH HOLDINGS SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
LIZA CHAN SOW KENG JC
[CIVIL APPEAL NO: WA-12BNCC-7-03-2022]
13 DECEMBER 2022

Abstract – *A bank customer has the paramount duty to properly supervise and control its staff from any misconduct, to adequately protect its funds with the bank from being wrongfully taken out by a non-signatory of the account, including to put in place appropriate procedures in order to control access to cheque books.*

TORT: *Conversion – Banker and customer – Cheques from customer's account forged and encashed by customer's employee – Proceeds of cheques debited from account by bank – Whether cheques forged – Whether bank took reasonable care – Whether bank had mandate to pay on cheques – Whether bank liable for tort of conversion*

TORT: *Negligence – Banker and customer – Cheques from customer's account forged and encashed by customer's employee – Proceeds of cheques debited from account by bank – Whether cheques forged – Whether bank negligent – Whether bank owed duty of care to customer – Whether there was breach of duty of care by bank – Whether customer had knowingly or negligently contributed to forgery – Bills of Exchange Act 1949*

The first respondent ('plaintiff') had maintained a current account with the appellant ('bank'). The plaintiff discovered that, between 2014 and 2017, a total of 37 cheques from the account amounting to RM254,890 ('sums'), were forged ('cheques') and encashed by the plaintiff's employee, the second respondent ('second defendant'). The bank had debited the proceeds of these cheques from the account. This prompted the plaintiff to claim against the bank, at the Sessions Court: (i) based on the tort of conversion; (ii) for breach of the express and/or implied terms of the plaintiff's contract and/or written mandate with the bank; and (iii) for negligence and/or breach of the bank's duty of care to its customer, the plaintiff. The plaintiff sought a declaration that the bank was not entitled to debit the sums and further sought the repayment of the said sums. The bank, in its defence, argued that: (i) the cheques were not forged and it had no knowledge that the cheques were forged or were presented without authority; (ii) there was no breach of any duty of care as the bank, in making payment on the cheques, acted in good faith and honestly, following the bank's standard operating procedure ('SOP'); and (iii) the plaintiff was negligent by failing to detect the withdrawal of funds by its own employee over a span of three years and the

plaintiff did not, within 14 days of receipt of the monthly statements, inform the bank that the statements were incorrect. The Sessions Court held in favour of the plaintiff and hence, the present appeal by the bank. The issues that arose for adjudication were: (i) whether the signatures on the cheques were forged; and if so, (ii) whether the plaintiff had knowingly or negligently contributed to the forgery and, as such, the signatures should operate and be deemed to be the signatures of the sole authorised signatory of the plaintiff's director ('SP1').

Held (allowing appeal):

(1) The plaintiff had proven its case, on a balance of probabilities, that the cheques were forged based on the following reasons: (i) SP1's evidence, that her signature on the cheques were forged, was not challenged; (ii) the signatures appearing on the cheques were examined by a document examiner ('SP2') with the Department of Chemistry Malaysia. SP2 had given expert evidence in court in over 100 cases and there were no written records where her evidence had been rejected by the court. SP2 was not appointed by the plaintiff but was subpoenaed to testify; she was independent and disinterested in the proceedings. Her evidence was entitled to great respect, particularly when the bank did not adduce any expert evidence on its own. Therefore, the bank could not press the argument that it was unaware of the forgery or that it took reasonable care by following its SOP. (paras 14-16 & 19)

(2) The plaintiff had negligently contributed to the forgery or the making of the unauthorised signature, by not only entrusting the cheque books with the second defendant, but also by failing to check the statements against the cheque butts. If the plaintiff had dutifully checked the bank statements against the cheque butts and reconciled its cash ledgers, the forgery/fraud would have been detected and would have surfaced to prevent the losses now occasioned. In this case, it was not three missing cheques but 37 missing cheques; undetected forgeries were committed over a period of three years. This shone light on the plaintiff's own poor, reckless, careless and irresponsible management and system of controls. This unfortunate state of affairs was authored by the plaintiff itself. (paras 37 & 38)

(3) *Sans* any evidence of dishonesty, the bank was deemed to have acted in good faith, pursuant to s. 95 of the Bills of Exchange Act 1949. There was nothing to suggest otherwise than that the bank had acted in good faith. As per the bank's SOP, its officers were not required to contact the customer if a cheque encashed is less than RM5,000 or unless the signature on the cheques appear 'shaky' or not smooth. Furthermore, the plaintiff owed a contractual duty to take steps to check its monthly bank statements and notify the bank of any discrepancies within 14 days of

receipt of the monthly statements. Breach of this obligation meant that the statements were deemed correct and the plaintiff was estopped from relying on the forgery of the second defendant. (paras 43 & 44)

Case(s) referred to:
Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors [2006] 3 CLJ 1 FC ***(refd)***
Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Case [1995] 3 CLJ 639 CA ***(refd)***
Al Sharhan Sdn Bhd & Anor v. Edipro Construction & Engineering [2020] 1 LNS 1046 HC ***(refd)***
Browne v. Dunn (1893) 6 R 67 ***(refd)***
CIMB Bank Bhd v. Panaron Control Sdn Bhd [2015] 1 CLJ 1056 CA ***(refd)***
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***
Leolaris (M) Sdn Bhd v. Bumiputra Commerce Bank Bhd [2012] 6 CLJ 423 HC ***(refd)***
Lipkin Gorman (A Firm) v. Karpnale Ltd [1992] 4 All ER 33 ***(refd)***
Malaysia Plastics Sdn Bhd v. United Overseas Bank (Malaysia) Bhd [2012] 4 CLJ 997 HC ***(refd)***
Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors [2020] 10 CLJ 1 FC ***(refd)***
PP v. Muhamed Sulaiman [1982] 1 LNS 123 FC ***(refd)***
Prima Nova Sdn Bhd v. Affin Bank Bhd [2014] 9 CLJ 442 CA ***(refd)***
Public Bank Bhd v. Anuar Hong & Ong [2005] 1 CLJ 289 HC ***(refd)***
Public Bank Bhd v. Tetuan Kumar Jaspal Quah & Aishah [2016] 3 CLJ 548 CA ***(refd)***
Public Bank Bhd & Anor v. Exporaya Sdn Bhd [2013] 2 CLJ 753 CA ***(refd)***
Sivalingam Periasamy v. Periasamy & Anor [1996] 4 CLJ 545 CA ***(refd)***
United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd [1993] 2 CLJ 31 SC ***(refd)***
Yoong Sze Fatt v. Pengkalen Securities Sdn Bhd [2010] 1 CLJ 484 CA ***(refd)***

Legislation referred to:
Bills of Exchange Act 1949, ss. 24, 73A, 95
Evidence Act 1950, s. 45

For the appellant/1st defendant - Karen Lee & Cheah Kha Mun; M/s Wong Kian Kheong
For the plaintiff/1st respondent - Tan Cheng Leong; M/s KP Lu & Tan

Reported by Najib Tamby

JUDGMENT

Liza Chan Sow Keng JC:

Introduction

[1] This appeal by the appellant emanated from the decision of the learned Sessions Court Judge ("LSCJ") dated 25 February 2022 in allowing the first respondent's claim against the appellant with costs after a full trial.

[2] In this judgment, the parties will be referred to as they were in the Sessions Court. In the court below, the appellant herein was the first defendant (interchangeably called "the bank"), whilst the first respondent was the plaintiff, and the second respondent was the second defendant.

[3] On 21 September 2022, I allowed the bank's appeal with costs. These are the reasons as to why.

Background

[4] The plaintiff was a customer of the bank and had maintained a current account No. 27700024925 ("the account") with the bank.

[5] The second defendant was employed by the plaintiff as an accounts clerk between 8 December 2012 and 2 November 2017.

[6] The sole authorised signatory of the plaintiff is one Ms Teh Chee Yen, a director of the plaintiff who testified on behalf of the plaintiff as "SP1".

[7] In November 2017, the plaintiff discovered that between October 2014 to September 2017, a total of 37 cheques from the account amounting to RM254,890 were forged ("the disputed cheques") and encashed by its employee, the second defendant. The bank had debited the proceeds of these cheques from the account.

[8] The plaintiff filed a claim at the Sessions Court on 6 November 2019 based on the tort of conversion, for breach of the express and/or implied terms of the plaintiff's contract and/or written mandate with the bank as a banking institution; and for negligence and/or breach of the bank's duty of care to its customer, the plaintiff. The plaintiff sought a declaration that the bank is not entitled to debit the account in the sum of RM254,890 and a further order for the repayment of the said sum to the plaintiff.

[9] The bank in its defence in essence alleged that:

(i) the cheques were not forged; it had no knowledge that the cheques were forged or were presented without authority;

(ii) there was no breach of any duty of care as the bank in making payment on the cheques acted in good faith and honestly, following the bank's prevailing standard operating procedure ("SOP");

(iii) the plaintiff itself was negligent by failing to detect the withdrawals of funds by its own employee over a span of three years; the plaintiff did not, within 14 days of receipt of the monthly statements inform the bank that the statements are incorrect in breach of cl. 11 of the terms and conditions of the current account ("T&C") and the statements are deemed correct.

Decision Of The Sessions Court

[10] The learned SCJ in her grounds of judgment ("GOJ") found that:

(i) the signatures in the disputed cheques were forged;

(ii) there was no evidence that the second defendant was authorised to cash the disputed cheques nor was their evidence that she was authorised to give instructions to the bank;

(iii) the plaintiff had taken preventive measures from fraud and forgery, by keeping the cheque books in a locked drawer, as well as checking the monthly statements;

(iv) the bank's assertion that it acted in good faith and honestly was not supported by any evidence;

(v) the bank failed to follow its own SOP;

(vi) the bank failed to call the plaintiff or SP1 for verification prior to cashing the disputed cheques;

(vii) although a letter was issued to the bank by the plaintiff on 7 September 2017 to authorise the second defendant, this letter was however issued prior to the last of the disputed cheques. No earlier evidence of authorisation was given to the second defendant;

(viii) a few witnesses of the bank admitted to seeing differences in the signatures, however, these bank officers did not have sufficient time to properly scrutinise the signatures on the cheques, nor were the officers given proper training to detect forgery of signatures;

(ix) the bank officers had also let their guard down as they were familiar with the second defendant due to their frequent dealings with her;

(x) although the bank was aware that forgery cases were on the rise, yet the bank failed to take precautionary measures to prevent forgery;

(xi) the bank is *prima facie* liable pursuant to s. 24 Bills of Exchange Act 1949 ("BEA") and not entitled to rely on s. 73 BEA as the bank contention that it had acted in good faith is a bare assertion, and

(xii) although the bank was not informed of any forgery of the monthly bank statements, however, the statements were forged by the second defendant and the plaintiff ought not to be blamed for such an "unexpected occurrence".

[11] The learned SCJ as such found for the plaintiff and entered judgment for the plaintiff.

Law On Appellate Intervention

[12] In *Al Sharhan Sdn Bhd & Anor v. Edipro Construction & Engineering* [2020] 1 LNS 1046; [2021] 10 MLJ 585, I have discussed the fundamental principles pivotal to be borne in mind by an appellate court in hearing an appeal from a judgment of the trial court:

> [7] In hearing this appeal, this Court as an appellate court is reminded that it should be slow to interfere with the findings of fact of a trial judge. Reference is made to *China Airlines Ltd v. Maltra Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) And Another Appeal* [1996] 3 CLJ 163 where the Federal Court at page 175 said:

A It is a settled principle of law that in an appeal, where facts have to be reviewed, it is undesirable that the findings of the court below should be disturbed by a court of appeal unless it appears that those findings are clearly wrong, and more especially that it is undesirable to do so where the conclusion reached must to a large extent depend on the credibility of the witnesses and the B impression formed by a court which has seen them and can judge their honesty and accuracy.

[8] In *Lee Chee Keong v. Fadason Holdings Sdn Bhd* [2017] MLJ 728, the Court of Appeal citing the judgment of Nallini Pathmanathan JCA (now FCJ) in *MMC Oil & Gas Engineering Sdn Bhd v. Tan Boon Kwee & Sons Sdn Bhd* C [2016] 2 MLJ 428 held that appellate interference is only warranted where no reasonable Judge could have reached the same conclusion of the trial judge:

[15] This is a point of some importance because it underscores the rationale that the appellate court is not at liberty to reverse or D interfere in the finding of a trial judge even if the appellate court is clearly of the view that it would not have reached the conclusion the trial judge did on the evidence on record before it. It requires something more. The requisite or correct standard to be applied is that no reasonable judge, on the evidence on record, could have reached the conclusion of the trial judge. In other words, so long E as the findings of the trial judge are plausible on the evidence on record, there is no room for interference merely on the grounds that the appellate court forms a different opinion on the same evidence.

[9] The Federal Court in *Ming Holdings (M) Sdn Bhd v. Syed Azahari Noh Shahabudin & Anor* [2010] 6 CLJ 857 at pages 873 to 875 had this to say: F

[41] Before we leave this subject and move on to the next two questions, *we feel a need to remind that a trial judge has the advantage over an appellate court in hearing the witness and observing his demeanour. Thus, unless the trial judge is plainly wrong in his finding, the appellate court should not reverse a finding of fact by the trial judge*. This "plainly wrong" test has G been long established and can be observed in the Judicial Committee of the Privy Council pronouncement in *Chow Yee Wah & Anor v. Choo Ah Pat* [1978] 1 LNS 32 where Lord Fraser said:

> In the face of that finding by the trial judge on the question of fact the Federal Court were *only entitled to displace his conclusion if they were* H *satisfied that his view was plainly wrong and that any advantage which he enjoyed by having seen and heard the witness was not sufficient to explain his conclusion*, as the authorities already quoted show.

[42] Before stating this, Lord Fraser cited two cases in support which we find appropriate to repeat as a reminder to all appellate courts of their role in dealing with a finding of fact by a trial judge. I

[43] The first is Lord Tankerton in *Watt or Thomas v. Thomas* [1947] AC 487: A

(1) Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself as a judge, an appellate court which is disposed to come to a different conclusion on printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion. B

(2) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence. C

(3) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen or heard the witnesses, and the matter will then become at large for the appellate court. D

[44] The second is from Viscount Sankey LC in *Streatham Manor Nursing Home* [1935] AC 36, 36 who said:

> *... it is perfectly true that an appeal is by way of rehearing, but it must not be forgotten that the Court of Appeal does not rehear the witnesses*. It only reads the evidence and rehears the counsel. Neither is it reseeing the court. There are different meanings to be attached to the word 'rehearing'. For example, the rehearing at the Quarter Sessions is a perfect rehearing because, although it may be the defendant who is appearing, the complainant starts again and has to make out his case and call his witnesses. The matter is rather different in the case of an appeal to the Court of Appeal. There the onus is upon the appellant to satisfy the court that his appeal should be allowed. There have been a very large number of cases in which the law on this subject has been canvassed and laid down. There is a difference between the manner in which the Court of Appeal deals with a judgment after trial before a judge alone, the Court of Appeal will not set aside the judgment unless the appellant satisfies the court that the judge was wrong and that his decision ought to have been the other way. Where there has been a conflict of evidence the Court of Appeal will have special regard to the fact that the trial judge saw the witnesses: see *Clarke v. Edinburgh Tramways Co*: per Lord Shaw, 1919 S.C. (HC) 35,36, where he says: E F G H
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> When a judge hears and sees witnesses and makes a conclusion or inference with regard to what on balance is the weight of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the judge makes any observation with regard to creditability or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, I

A and does not believe another. But that is not the ordinary case of a cause in a court of justice. In the courts of justice in the ordinary case things are much more evenly divided; witness without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in their nuance, of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed pages. What in such circumstances, thus psychologically put, is the duty of the appellate court? In my opinion, the duty of the appellate court in those circumstances is for each judge of it to put himself, as I now do in this case, the question: Am I who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

[45] The above principle is reiterated by this Court in *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309.

[10] The Court of Appeal has also in the case of *Sivalingam Periasamy v. Periasamy & Anor* [1995] 3 MLJ 395 clearly stated that:

> It is trite law that this court will not readily interfere with the findings of fact arrived at by the court of first instance to which the law entrusts the primary task of evaluation of the evidence. But we are under a duty to intervene in a case where, as here, the trial court has so fundamentally misdirected itself, that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion.

[11] It is also trite that apart from a wrong application of the law, insufficient judicial evaluation of the evidence also justifies appellate intervention – *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19 where the Court of Appeal speaking through Gopal Sri Ram JCA (as he then was), stated the need to assess the evidence and to weigh them and for good reasons accept or reject them accordingly, as follows:

> Suffice to say that we re-affirm the proposition that an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence. It is, we think appropriate that we say what judicial appreciation of evidence involves. *A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him*. He must, when deciding whether to accept or to reject the evidence of a witness, test it against relevant criteria. Thus, he must take into account the presence or absence of any motive that a witness may have in giving his evidence.

> If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case. A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness' evidence runs the risk of having his findings corrected on appeal. It does not matter whether the issue for decision is one that arises in a civil or criminal case: the approach to judicial appreciation of evidence is the same.

[12] The above statement of law on the need to assess, weigh and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before the court was affirmed by the Federal Court in *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* (*supra*) where the Federal Court said:

> In our view, the Court of Appeal in citing these cases had clearly borne in mind the central feature of appellate intervention, *ie*, to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. In so doing, the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court. Clearly, the phrase 'insufficient judicial appreciation of evidence' merely related to such a process. This is reflected in the Court of Appeal's restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. The Court of Appeal further reiterated the principle central to appellate intervention, ie that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal. This is consistent with the established plainly wrong test.
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> (emphasis added)

Decision Of This Court

[13] From the numerous grounds of appeal filed, in my respectful view, the core issues in this appeal are: (i) whether the signatures on the disputed cheques were forgeries; and if so (ii) whether the plaintiff had knowingly or negligently contributed to the forgery and as such the signatures should operate and should be deemed be the signatures of SP1.

Whether The Signatures On The Disputed Cheques Were Forgeries?

[14] After evaluating and deliberating on all evidence led, testing the oral and documentary evidence against each other, I am of the view that the plaintiff had proven its case on a balance of probability that the disputed cheques were forged.

[15] Firstly, SP1's evidence-in-chief that her signature on the disputed cheques were forged was not challenged. The bank's failure to 'put' its case on forgery to SP1 under cross-examination attracts the application of the

principle in *Browne v. Dunn* (1893) 6 R 67 and accepted by the Court of Appeal in *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Case* [1995] 3 CLJ 639; [1995] 2 MLJ 770 and in *Sivalingam Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545; [1995] 3 MLJ 395 – it must be taken that the bank has abandoned its pleaded defence. The Court of Appeal in *Aik Ming* (*supra*) applied the principle in *Browne v. Dunn* and said:

> Now, all this is contrary to two fundamental rules of procedural fairness that operate in the environment of private law. The first of these rules relate to the pleaded case while the second has to do with the cross-examination of witnesses. ...
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> The content of the second rule may be stated thus. It is essential that a party's case be expressly put to his opponent's material witnesses when they are under cross-examination. A failure in this respect may be treated as an abandonment of the pleaded case and if a party, in the absence of valid reasons, refrains from doing so, then he may be barred from raising it in argument. It is quite wrong to think that this rule is confined to the trial of criminal causes. It applies with equal force in the trial of civil causes as well.

[16] Second, the signatures appearing on the disputed cheques were examined by Puan Siti Nur Musliha bt Mohamad Noor ("SP2"), a document examiner with the Department of Chemistry, Malaysia. SP2 is a gazetted document examiner in the service of the Government of Malaysia; SP2 possesses the requisite skill, knowledge and experience to analyse and opine on the genuineness of handwriting and signatures and has given expert evidence in court in over 100 cases, and there are no written records where her evidence has been rejected by the court. I find that she possessed the necessary skills within the requirements as set out in *Yoong Sze Fatt v. Pengkalen Securities Sdn Bhd* [2010] 1 CLJ 484; [2010] 1 MLJ 85 and *PP v. Muhamed Sulaiman* [1982] 1 LNS 123; [1982] 2 MLJ 320 at p. 332 and is an expert witness within the meaning of s. 45 of the Evidence Act 1950. She was instructed by the Royal Malaysian Police to make a comparison between specimen documents containing signatures of SP1, with the signatures on the disputed cheques, and her conclusion as set out in her written expert report dated 4 July 2018 was that the questioned signatures were not written by the plaintiff whilst a few of the questioned signatures were most probably written by the plaintiff. As she was not appointed by the plaintiff but rather, she was subpoenaed to testify, I find that she may be described as independent and disinterested in these proceedings. Her evidence is therefore entitled to great respect particularly when the bank did not adduce expert evidence on its own.

[17] The learned SCJ's finding that the signatures on the disputed cheques were forgeries as such, is not without basis even though she did not say in her GOJ whether she gave due weight to SP2's evidence.

[18] Under common law, a bank which pays out on a forged cheque drawn on its customer's account is liable to make good the loss. The common law was codified in s. 24 of the Bills of Exchange Act 1949 ("BEA") as follows:

> **Forged or unauthorised signature**
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> 24. Subject to the provisions of this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorised signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority:
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> Provided that nothing in this section shall affect the ratification of an unauthorised signature not amounting to a forgery.

[19] It is therefore no answer for the bank to press the argument that it was unaware of the forgery or that it took reasonable care by following its SOP. The bank has no mandate to pay on the disputed cheques and is liable for conversion, a strict liability tort – *United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd* [1993] 2 CLJ 31; [1993] 1 MLJ 182. In *Tai Soon Heng*, the bank was held liable for honouring 97 forged cheques totalling some RM1.5 million that were cleared over a period of three years. The bank argued that the customer was under a duty to ensure that its cheques were not forged by its employee and that it had acted in breach of this duty on the facts of the case. Following various cases in the Commonwealth, the Supreme Court held that there is no duty on the customer to take precautions in the general course of its business to prevent forgeries on the part of its servants. The Supreme Court held that a customer has a common law duty to the bank as follows:

(i) the customer has a duty of taking reasonable care in the drawing of cheques so as not to mislead the bank or facilitate forgery. This principle is recognised as the '*Macmillan* duty'; and

(ii) the customer has an implied duty to inform the bank if he discovers that cheques purporting to have been signed by him have been forged, referred to under common law as the '*Greenwood* duty'.

Whether The Plaintiff Had Knowingly Or Negligently Contributed To The Forgery

[20] Liability under s. 24 BEA is however not absolute as this provision itself is made "subject to the provisions of this Act". The BEA was amended by the Bills of Exchange (Amendment) Act 1998 which came into effect on 1 July 1998 by the insertion of s. 73A which reads:

Knowingly or negligently facilitating forgery

73A. Notwithstanding s. 24, *where a signature on a cheque is forged or placed thereon without the authority of the person* whose signature it purports to be*, and that person whose signature it purports to be knowingly or negligently contributes to the forgery or the making of the unauthorised signature*, the *signature shall operate* and *shall be deemed to be the signature of the person it purports to be in favour of any person who in good faith pays the cheque or takes the cheque for value*.

(emphasis added)

[21] Thus, s. 24 BEA has now to be read *in tandem* with s. 73A BEA. The legislative intention of s. 73A was explained by the Court of Appeal in *Prima Nova Sdn Bhd v. Affin bank Bhd* [2014] 9 CLJ 442 (CA):

> 23 in our judgment, the *effect of* s. 73A *is to afford protection to a bank paying 'in good faith' in all cases in which there was negligence on the part of the drawer and which negligence afforded the opportunity for the forgery or fraud in circumstances that were the immediate cause of the payment by the banker* ... In other words, the effect of the amendment is that our courts should no longer determine the liability of a bank on a claim on forged cheques based on whether the customer observed the '*Macmillan*' and '*Greenwood*' duties approved by the Supreme Court in *United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd* (*supra*) but the wider duty of care considered but rejected by the Privy Council in *Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd & Ors* (*supra*).
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> (emphasis added)

[22] By virtue of the amendment to the BEA, in other words, the customer and authorised signatory is required to ensure that they do not facilitate or make it easier for a person who is not the authorised signatory to commit forgery. A common example of such negligence envisaged, is where a non-signatory is given access to the cheque book.

[23] In considering this issue, this court has borne in mind that the bank bears the burden of proving that:

(i) the signature on the cheques were forged;

(ii) the person whose signature was allegedly forged knowingly or negligently contributed to the forgery; and

(iii) it paid the cheque in good faith.

Knowingly Or Negligently Contributed To The Forgery

[24] In *Malaysia Plastics Sdn Bhd v. United Overseas Bank (Malaysia) Bhd* [2012] 4 CLJ 997; [2012] 9 MLJ 336, Nallini Pathmanathan J (now FCJ) held that in determining whether the customer had "negligently contributed" to the forgery, the court is not limited to looking into breaches of the *Macmillan* duty and the *Greenwood* duty. Her Ladyship pointed out that s. 73A speaks specifically of a "negligent contribution to forgery", which envisages that someone other than the customer has affected a forgery, and the customer has negligently contributed to that act of forgery.

[25] Thus in *Prima Nova Sdn Bhd v. Affin Bank Bhd* [2014] 9 CLJ 442 (CA) where the authorised signatories of the cheque book of the appellant did not keep it in their possession, instead it was kept by a clerk in the employ of the appellant who was not the authorised signatory, even though the appellant maintained a safe, the appellant was held to be negligent and it was this negligence that had facilitated the forgery, ultimately causing the respondent to honour the stolen cheques:

> 24. Applying the wider statutory duty of care introduced by section 73A, in our opinion, on the balance of probabilities the appellant was negligent and it is this negligence that facilitated the forgery, ultimately causing the respondent to honour the stolen cheques. ... Our finding is that, obviously the staff had easy access to the cheque book and the file containing the specimen signatures thereby facilitating the 'making' of their signatures on the stolen cheques. We are conscious that there is a plethora of authorities to the effect that delegating the task of looking after the cheque book to a staff member and not placing the cheque book in the safe does not *per se* constitute negligence. With respect, in our judgment, this line of authorities can no longer be followed following the introduction of section 73A.

[26] The Court of Appeal in *Prima Nova* made clear that with the introduction of s. 73A, the courts would no longer determine the liability of the bank on a claim on forged cheques based on whether the customer observed the *Macmillan* or the *Greenwood* duties and held that so long as the forgery or the incorporation of the unauthorised signature of the mandatory signatories was caused by the negligence of the authorised signatories, then the bank is protected provided the payment of the cheque is effected in good faith.

[27] In *CIMB Bank Bhd v. Panaron Control Sdn Bhd* [2015] 1 CLJ 1056, the bank's customer was a company based in Kuala Lumpur. It appointed a manager who solely oversaw the company's administrative and financial matters in its Bintulu branch. The customer alleged that the bank had unlawfully and without mandate or authority honoured 196 forged cheques drawn on the client's current account. Although it was not established on evidence who had perpetrated the forgery of the cheques and the alteration of the cheque book requisition slips, strong suspicion fell on the manager who had since absconded from his employment. The customer's statement of account had been doctored to hamper the detection of the forgery. The court in allowing the bank's defence under s. 73A found *inter alia* as follows:

(i) the duty of care expected of a customer did extend to cover proper control and supervision of critical staff and to put in place appropriate procedures relating to the access to cheque books and also entailed the customer's periodic checking of its account with the bank;

(ii) the forgeries of the 196 disputed cheques encashed through the customer's account took place over more than four years (2002 to 2006) and went undetected over that prolonged period;

(iii) there was no system in place by the customer to protect its monies in the account. There was no one else to manage accounts besides the manager and the statements of account were directly sent to Bintulu, and not the customer's Kuala Lumpur branch;

(iv) in December 2005, the customer discovered some discrepancy in the account but let operations continue until August 2006.

[28] The court held that the customer has the paramount duty to properly supervise and control its critical staff from any misconduct, to adequately protect its funds with the bank from being wrongfully taken out, including to put in place appropriate procedures in order to control access to cheque books and it was not justifiable to shift the blame. The customer was found negligent despite assigning PW6 with the duties to monitor from Kuala Lumpur cheque transactions in respect of the respondent's account at Bintulu.

[29] *Panaron* was cited with approval in *Public Bank Bhd v. Tetuan Kumar Jaspal Quah & Aishah* [2016] 3 CLJ 548; [2016] MLJU 1719 where the Court of Appeal in allowing the bank's appeal said:

> [58] ... The focus of the learned judge was far removed from the critical issue, namely, whether the respondent had provided for adequate control system to prevent forgeries and fraud within its operations. In this appeal, it is manifestly clear that the learned judge had committed the same mistake because His Lordship totally failed to address his mind adequately to the question of the adequacy of the control system to prevent forgeries and fraud within the respondent's own operations.
>
> [59] We agree with this Court in *Panaron* that the customer has the duty to properly supervise and control its critical staff from any misconduct including to put in place appropriate procedures in order to control access to cheque books. In *Panaron*, the respondent was found negligent despite assigning PW6 with the duties to monitor from Kuala Lumpur cheque transactions in respect of the respondent's account at Bintulu.

Good Faith

[30] The term "good faith" appears to place a low threshold for the bank to satisfy as s. 95 of the BEA by its very wording:

> A thing is deemed to be done in good faith, within the meaning of this Act, where it is in fact done honestly whether it is done negligently or not.

[31] That the threshold is low was recognised by the High Court in *Leolaris (M) Sdn Bhd v. Bumiputra Commerce Bank Bhd* [2012] 6 CLJ 423; [2013] 7 MLJ 25 (HC) when it held:

> It must be noted that when it relates to instruments relating to Bills of Exchange the threshold requirement for good faith in English law is very low, that is to say, once it is established that the holder took the instrument in good faith, he is entitled to all the rights of a holder in due cause notwithstanding that he was careless, that he made no enquiry, and that he was informed of facts which would have led a reasonable man to make further inquiry, provided, however, that he had no notice of any defect in the transferor's title (see *Jones v. Gordon* (1877) 2 App Cas 616; *Auchteroni & Co v. Midland Bank Ltd* [1928] All ER Rep 627).

[32] In the instant case, the bank's learned counsel submitted that it has been proven by overwhelming evidence that SP1 on behalf of the plaintiff, had negligently contributed to the forgery or making of the unauthorised signature by entrusting the cheque books with the second defendant and failing to check the statements against the cheque buds. Just as in the *Panaron* case, the forgeries of the 37 disputed cheques took place over a prolonged period of more than three years and the bank's employees (SD1 to SD 8) had all acted in good faith and honestly. No evidence was adduced to prove otherwise.

[33] Clause 3(a) of the general terms & conditions of accounts provide:

> 3(a) The Customer(s) shall be responsible for keeping the cheque books under lock and key at all times. *The Customer(s) shall inform HLB immediately in the event a cheque book or cheque leaf is missing, lost, stolen or destroyed. HLB will not be liable or responsible for any loss incurred by the Customer(s) if through his/her negligence or omission an unauthorised person obtains the cheque book or leaf and fraudulently obtains payment on any sum belonging to the Customer(s).*
>
> (emphasis added)

[34] The learned SCJ's finding that the plaintiff had taken preventive measures from fraud and forgery, by keeping the cheque books in a locked drawer is clearly indefensible, when in fact SP1 had as borne out by the evidence entrusted the plaintiff's cheque books with the second respondent in breach of cl. 3(a) T&C:

(i) SP1 did not say in her police report that the plaintiff's cheque books were stolen. Instead, SP1 said in her police report which was made immediately after she discovered the fraud:

> saya menyuruh dia (D2) menyerahkan buku cek yang dia simpan, dia memberitahu buku cek berada di rumahnya.

(ii) SP1's office drawers where the cheque books were kept were not broken into and are in perfect condition. It is well-nigh impossible for anyone without the combination to have opened the drawers without breaking the lock and she was not re-examined on the following evidence elicited in cross-examination:

KL : Yes, ok. Now do you agree also in your police report, you did not say that, you did not allege that the Second defendant broke open your drawer? Do you agree?

TEH: Yes. I agree.

KL : Ok. If you look at the photos that were just marked, right, the photos of the drawer that we just marked as P5. P5 at Bundle E, P5, Bundle E, this looks like a drawer that has never been broken into. It's in perfect condition, am I right?

TEH: Yes.

KL : This is the drawer that you claim that you kept your cheque books.

TEH: Yes.

[35] From perusing the evidence, it is clear or can irresistibly be inferred that the plaintiff and/or SP1 as a sole signatory of cheques had allowed the second defendant who is not an authorised signatory to have possession of the cheque book and when the forgery occurs, the plaintiff is negligent under the wider statutory duty of care under s. 73A – *Prima Nova*. On the facts, the instant case is stronger than *Prima Nova* where the drawer where the cheque books were kept was locked but was forced open. Here, there is no evidence of any breaking in. The learned SCJ did not apply the law that the customer owes a duty to take care to ensure that the cheque book was not accessed by a non-signatory of the account and appears to have in para. 22(f) of her GOJ completely ignored this failure of the plaintiff or SP1 keep the cheque books in their custody constitute negligence under the wider statutory duty of care under s. 73A BEA. That makes her decision impeachable based on the decision in *Prima Nova* where the facts are not dissimilar to the present case.

[36] The learned SCJ in para. 22(g) of her GOJ found that the statements were forged by the second defendant but the plaintiff should not be blamed for such an unexpected occurrence. In so doing, the learned SCJ plainly overlooked that the plaintiff did not check the cheque butts against the bank statements and that had she done so she would have noticed that the cheque butts of the 37 transactions were not recorded in the forged statements. Not reconciling the monthly statements against the cheque butts is clearly unjustifiable as evident from the answers in cross-examination of SP1:

KL : Ok. Now these statements that you claimed that were forged, how did you receive them?

TEH : From the Second, from my colleagues, either from my sec, from the Second defendant or my other colleagues.

KL : Second defendant or your other colleagues.

TEH : Yes.

KL : Who are the other colleagues, Ms Teh?

TEH : My admin girl, her name is, was Suzanna.

KL : Only one?

TEH : Or Wahidatul.

KL : Yes, so either the Second defendant will bring them to you or the other admin clerk, am I right?

TEH : Yes.

KL : And is the admin clerk still with you?

TEH : No.

KL : And would she, would either this admin clerk or the Second defendant bring these statements to you on a monthly basis?

TEH : Yes, but mostly Wahid.

KL : Mostly Wahid? Second defendant. So, what do you do when you received these statements?

TEH : I will file it into my bank statement file.

KL : Is that all you would do?

TEH : **And I will after that tally it with the cash ledger which I state what are the payments and what are the cheques that I have issued out**.

KL : Right, and that is all you would do?

TEH : Yes.

...

KL : Now when you check your online, the statement, the banking statement, the forged statements, alright, do you agree that if you do not check, compare your statement with the cheque buds, you wouldn't have known that there was a missing cheque.

TEH : Repeat again.

KL : You see, if you have, you have now the banking statement, your monthly statement that the bank sends to you, alright. *If you had compared that statement every month with your cheque buds, you would have immediately noticed something was wrong, because the cheque buds, the cheques that has been issued is not reflected in your statement. Am I right*?

TEH : I don't agree.

KL : How else would you detect, how else can you reconcile the statement with the cheque buds, Ms Teh?

TEH : Can you repeat that again?

KL : Ms Teh, my question is very simple.

TEH : Yes.

KL : It is done on a daily basis by anybody who is in business or even not in business, your personal account, when you receive your banking statement, especially for a current account statement to? which cheques are issued, cheque books are issued, **do you not agree that the prudent thing to do is to check your statements against your cheque buds to make sure they tally**?

TEH : Or the cash ledger, right, because you know what are the cheques that's issued out and what are the -

KL : **Well, if you had done that, you would have noticed 43 cheques being forged, right**?

TEH : **Yes**.

...

KL : Ok, never mind. Never mind, it's ok. I take you, let's look at some of the samples of the forged statements, ok. Now you look at Bundle D, Denmark. I bring you to the genuine statements first.

TEH : Bundle, sorry, bundle?

KL : Bundle D, Denmark. D for Denmark, at page 372.

TEH : 3-7?

KL : 3-7, 372, yes, yes. 372 is the disputed cheques. Ok, one of the disputed cheques.

TEH : 3-7?

KL : 2.

TEH : 2.

KL : Ok. I would like you to keep that page open, and now open Bundle E, alright, Bundle E, at page 10.

TEH : Bundle E?

KL : E, yes. Now are you there, Ms Teh? Ok, take your time, Bundle E, E for England.

TEH : England.

KL : E.

TEH : Ok.

KL : Ok. Now at page 372, is a copy, photocopy of a disputed cheque. Ok, issued on the 07.01.2016. Ms Teh are you with me?

TEH : Yes.

KL : *Now what I am saying is this. Now if you, when this cheque leaf is taken out of the cheque book, there would be remaining a cheque bud, am I right? The cheque bud will contain the particulars of the cheque number.*

TEH : **Yes**.

KL : **Alright. The purpose of the cheque bud is to record this particular cheque that has gone out. Correct, Ms Teh**?

TEH : **Correct.**

KL : Now when you receive the statement at page 10, the forged statement, alright, you can go through this forged statement. You can go through it. **This forged statement does not capture this? cheque that has been issued. You can go through it line by line and tell me whether I am right**.

TEH : **Correct.**

KL : So what I am saying is that, when you receive this statement, from the Second defendant or from your admin clerk, and if you had checked this statement against the cheque bud in the cheque book, you would have noticed either the statement is wrong or your cheque has been stolen. Am I right?

TEH : I don't agree.

KL : How else would you explain that the cheque issued on the 7th January is not captured in your statement, Ms Teh?

TEH : I don't know.

KL : Ok, if you do not know, that would have, what would you have done? Wouldn't you have called the bank? Any prudent person would have called the bank. Did you call the bank?

TEH : But I didn't know.

KL : You did not, because you didn't check against your cheque buds. Am I right?

TEH : I -

KL : Yes or no?

TEH : No.

KL : No what

TEH : What was your question again?

KL : **Did you check, when you received this statement, did you check these transactions against your cheque buds?**

TEH : **I can't remember but I definitely checked it with my cash ledger**.
(emphasis added)

[37] I agree with the submissions of learned counsel for the bank that the plaintiff had negligently contributed to the forgery or making of the unauthorised signature by not only entrusting the cheque books with the second defendant and failing additionally to check the statements against the cheque butts. In my respectful view, if the plaintiff had dutifully attended to

check the bank statements against the cheque butts, and reconciled its cash ledgers, the forgery/fraud would have been detected and would have surfaced to prevent the loss now occasioned. Likewise, as in the *Panaron* case, the fact that the monthly statements of account had been doctored to hamper the detection of the forgery ought not to be a ground to visit blame on the bank here.

[38] It is noteworthy that in this case, it is not three missing cheques, but 37 missing cheques, and forgeries committed over a period of three years that were not detected. It stupendously raises the eyebrows and shines the light on the plaintiff's own poor reckless, careless, and irresponsible management and system of controls. This unfortunate state of affairs was authored by the plaintiff itself. It is not merely incumbent on, but the law places a statutory duty on the plaintiff to ensure some level of adequate corporate governance in place. Premised on the circumstances of this case, the governance level was lax and totally inadequate.

[39] The learned SCJ appeared to have ignored the principles of law from cases decided by the Court of Appeal post introduction of s. 73A and fell into grave error when she did not address her mind at all to the burning question of whether there was an adequate corporate governance on the plaintiff's part to stave off forgeries and fraud within its operations.

[40] In this court's judgment, the learned SCJ was plainly wrong by completely overlooking the crucial evidence which show the bank had proven its case on the balance of probabilities as the plaintiff had failed to exercise due care to protect itself from the misconduct of its employee and that the plaintiff was in fact negligent by virtue of s. 73A BEA and had undoubtedly facilitated, or afforded the opportunity and provided the means of making it easier for the second defendant to commit the forgeries of the signatures on the cheques. I am thus entitled to disturb the finding of the learned SCJ which found that the bank was liable. With respect, I find that the learned SCJ fell into error in misapprehending the law and evidence in concluding that the plaintiff had successfully proved its case on a balance of probabilities against the bank.

[41] In *Public Bank Bhd v. Anuar Hong & Ong* [2005] 1 CLJ 289, where the customer failed to (i) verify its monthly current account statements; (ii) monitor its cheque books and keep them in a safe place; and (iii) supervise its accounts clerk, it was held that the customer was negligent as the bank cannot reasonably be required with their own legitimate commercial pressure and concerns to attend to, and be more vigilant in the customer's interest than the customer himself. Neither should the bank be expected to act as an amateur detective when the learned SCJ pronounced that the bank officers were not given proper training to detect forgery of signatures. In

Public Bank Bhd & Anor v. Exporaya Sdn Bhd [2013] 2 CLJ 753; [2013] 1 MLJ 507 at 518, the Court of Appeal referred to and applied the decision in the case of *Lipkin Gorman (A Firm) v. Karpnale Ltd* [1992] 4 All ER 331:

> The contractual duties of a bank towards a customer were established by the English Court of Appeal in the case of *Lipkin Gorman (a firm) v. Karpnale Ltd* [1992] 4 All ER 331 where Alliott J held the following propositions:
>
> (1) **The bank is entitled to treat the customer's mandate at its face value save in extreme cases**.
>
> (2) **The bank is not obliged to question any transaction which is in accordance with the mandate**; unless a reasonable banker would have grounds for believing that the authorised signatories are misusing their authority for the purpose of defrauding their principal or otherwise defeating his true intention.
>
> (3) It follows that if a bank does not have reasonable grounds for believing that there is fraud, it must pay.
>
> (4) Mere suspicion or unease do not constitute reasonable grounds and are not enough to justify a bank in failing to act in accordance with a mandate.
>
> (5) **A bank is not required to act as an amateur detective**.
>
> (emphasis added)

[42] In *Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors* [2006] 3 CLJ 1; [2006] 5 MLJ 1 at 13 where in following the decision in the case of *Lipkin Gorman (A Firm) v. Karpnale Ltd* [1992] 4 All ER 331, the Federal Court held that a bank is supposed to treat the customer's mandate at its face value, save in extreme cases. A bank is not obliged to question any transaction which is in accordance with the customer's mandate, unless there are grounds for believing that these was a misuse of authority for the purpose of committing a fraud.

[43] The learned SCJ additionally, overlooked that *sans* any evidence of dishonesty, the bank is deemed to have acted in good faith under s. 95 BEA which as alluded earlier, is a low threshold. Indeed, there is nothing to suggest otherwise than that the bank had acted in good faith. As per the bank's SOP, its officers are not required to contact the customer if a cheque encashed is less than RM5,000, or unless the signature on the cheques appear "shaky" or not smooth.

[44] That is not all. The plaintiff owes a contractual duty to take steps to check its monthly bank statements and notify the bank of any discrepancies within 14 days of receipt of the monthly statements – cl. 11 T&C. Breach of this obligation means the statements are deemed correct and the plaintiff is estopped from relying on the forgery of the second defendant.

[45] Central to appellate intervention, is that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal. This is consistent with the "plainly wrong" test – *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1 FC. In this regard, I have also borne in mind the most recent Federal Court pronouncement on the subject in *Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1; [2020] 12 MLJ 67 para. 148 per Zabariah Mohd Yusof FCJ that so long as the trial judge's conclusion can be supported on a rational basis in view of the material evidence, the fact that the appellate court feels like it might have decided differently is irrelevant. In other words, a finding of fact that would not be repugnant to common sense ought not to be disturbed. The trial judge should be accorded a margin of appreciation when his treatment of the evidence is examined by the appellate courts.

[46] I am however satisfied that the learned SCJ has clearly fallen into error in her insufficient appreciation of the evidence and misapprehending the law in concluding that the plaintiff had proven its case on a balance of probabilities against the bank. She also ought not to consider the several alleged breaches of the bank's duties that were not pleaded in making her findings. As such this court is entitled to disturb the findings of the learned SCJ.

[47] For the reasons given, I would allow this appeal and set aside the order dated 25 February 2022 of the Sessions Court, with costs to be paid by the plaintiff/first respondent.

[48] I must mention that I have not dealt with every single argument advanced and case authority relied upon by the parties as I found it unnecessary nor am I aware of any legal requirement to do so in arriving at a decision. It is also to avoid a lengthy judgment.